IN THE

# Supreme Court of the United States

No. 367.

JOHN W. BLYTHE and
HENRY T. BLYTHE,
*Appellants,*

vs.

FLORENCE BLYTHE HINCKLEY,
*Appellee.*

## APPELLANTS' REPLY BRIEF AGAINST THE MOTION TO DISMISS OR AFFIRM.

This suit involves the proposition maintained by appellents, that Section 10 of Article 1 of the Constitution of the United States, reading as follows:

> "No State shall enter into any treaty, alli-
> "ance or confederation,"

prohibits the respective States of this nation from making any laws concerning the descent of real property to non-resident aliens; and that

that subject is under the exclusive control of the Federal Government under its treaty-making power.

The above question presents itself thus:

There is a statute in California (known as Section 671 of the Civil Code), which reads thus:

> "Any person, whether citizen or alien, may "take, hold and dispose of property, real or "personal, within this State."

A man named Thomas H. Blythe whose heirs and next of kin these appellants are admitted to be, died intestate in California leaving a large estate in San Francisco land.

Appellee, Florence, was an English subject and an illegitimate infant child who had been and was in England till after descent cast.

She then came to California, and at her application, presented by an alien guardian, the Courts of California adjudged and distributed to her the land of said decedent, upon the sole claim that she was his illegitimate daughter and heir at law, and took by descent and not otherwise.

There is no treaty between England and the United States enabling her to take by descent.

Therefore Florence's sole possibility of taking by succession, was under said State statute.

These appellants, native citizens of the United States, residing in Kentucky and Arkansas, respectively, brought this suit against said Florence, who

(by marriage to a California man) had become meantime a resident and citizen of California, to quiet their title, setting up their claim that the said probate proceedings of the California Courts were void, because resting on void statutes, and were of no value against them, the next of kin and heirs at law of said Blythe.

This suit to quiet title was begun against said Florence before she was put into possession of said land, as authorized by a California statute (section 738 of the Code of Civil Procedure), which statute was sustained as a proceeding in equity by the decisions of this Court in

More *vs.* Steinbach, 127 U. S., 70, and
Ely *vs.* New Mex. &c., R. Co., 129 U. S., 293.

The Court got jurisdiction of this case in equity, under said statute, and on the ground of diverse citizenship of the parties, and on the ground that the land involved was in the northern district of California.

The bill alleges that California had no jurisdiction to enact or enforce Section 671 of the Civil Code, above set forth; and, also alleges, that Section 1978 of the Revised Statutes of the United States, confined inheritance of land to citizens of the United States.

The bill further alleges that none of the ques-

tions concerning the application or construction of the federal constitution or of this federal statute to this controversy, had been passed upon or considered in the said proceedings in the State Court.

Whatever proceedings *were* had in the State Court, were special, practically *ex parte*, and admintrative in their nature; under which, adverse pleadings were not permitted, and issues could not be and were not raised therein.

The questions are presented to this Court for the first time.

No non-resident alien has ever, by the judgment of this Court, been granted inheritance of land in the United States by virtue of a State statute to that effect, in the absence of an enabling federal treaty with the country of such alien.

Appellee's success on this motion would not only be a new and dangerous departure in federal jurisprudence, by conceding to the several states the treaty power to permit non-resident aliens to inherit land; but would result in giving to appellee San Francisco real estate valued at over $3,000,000; the property of appellants; and it would effect such results, without appellants being allowed a hearing either in the Circuit Court or in this Court.

And this, in the face of the facts, patent in the record, that appellants are citizens of Kentucky

and Arkansas, while appellee is a citizen of California, and the land involved is in California.

To appellants' case, as presented by their bill (Transcript, top page 29), appellee responded simply by a motion to dismiss for want of jurisdiction (Transcript, page 14), which was sustained by the Circuit Court.

Appellants made assignment of errors (Transcript, page 43), and the Court made its certificate of jurisdictional questions (Transcript, page 48).

The appeal from said judgment of dismissal is now met by appellee's present motion to dismiss or affirm.

Thus appellee seeks to establish her title to valuable land, and to dispose of this important and vital federal question (of the right of an illegitimate non-resident alien to inherit land in the United States in the absence of an enabling federal treaty), by securing as she has done, a denial of appellants' right to be heard in the Court below, and now by seeking, through the present motion, a denial of appellants' right to be heard in this Court.

The certificate of the Honorable Circuit Judge shows that these respective questions arose, and that the Court had no jurisdiction to decide them.

The facts in detail are as follows:

## STATEMENT OF THE CASE.

This is an appeal from a decree of the Circuit Court of the United States, Ninth Circuit, Northern District of California, dismissing appellants' bill for want of jurisdiction.

Appellants made their case in their third amended and supplemental bill, found at page 57 (side paging) of the record.

Defendant Florence Blythe Hinckley, without demurrer or other pleading, moved to dismiss the said bill.

The ground named in the motion (page 28) was, that the Court had no jurisdiction of the cause of action stated in the complaint.

The Court, in its opinion (page 33 of record) held that under the Act of March 3, 1875, it had no jurisdiction and dismissed the bill.

The decree of dismissal (page 81) declares that it is dismissed "for want of either Federal or equity jurisdiction."

This appeal is taken, under the judiciary Act of 1891, upon a certificate of jurisdictional questions (page 97), signed by the Judge. And we appeal on other grounds under Section 5 of the Act.

Consequently, this case involves no other question than that of the jurisdiction of the Circuit Court over the case made in the bill.

The motion to dismiss compels the Court to assume the truth of all the facts as stated in the bill.

The subject matter of the suit is a block of land in the city of San Francisco, worth about three millions of dollars.

Appellants are citizens of Kentucky and Arkansas, respectively, while defendant Florence Blythe Hinckley is, and was at the time the bill was filed, a citizen of California.

Thus the land is within the jurisdiction of the Circuit Court, and the citizenship, being diverse, gives the Court jurisdiction of appellants' suit.

The land in question was owned by Thomas H. Blythe, an American citizen, who died in San Francisco in 1883, intestate.

Appellants are native-born citizens of the United States, are the next of kin and heirs at law of said Thomas H. Blythe, and took by succession the estate of said Blythe and became the owners of said land.

The bill alleges that said defendant Florence was born in England, the bastard child of an unmarried woman, and was not the heir of Thomas H. Blythe, deceased. At the time of her birth, her mother was a resident of England and a subject of Queen Victoria, andsaid Florence was born a subject of Queen Victoria; and she remained in England at all times until after the death of said Thomas H. Blythe; and said Thomas H. Blythe was never married (page 60).

There was not, at any time during the life of said Blythe, any law in England under which Blythe could have legitimated said Florence or made her his heir at law, nor was there any law in force in England under or by the force of which he could have released or absolved said Florence of and from her allegiance to her sovereign, Queen Victoria, or changed her status from that of an English subject to that of a citizen of the

United States, nor was there any such law in force in California.

After the death of said Thomas H. Blythe, the said Florence, for the first time, left England and came to the United States, and came to San Francisco, she being then an infant who had never before been out of England, and who was then and there ineligible to become a citizen of the United States, and who was, when she arrived in California, a non-resident alien (page 61).

After said Florence came to San Francisco, to wit: in 1883, one James Crisp Perry, himself a British alien, was appointed her guardian, and, as such, he commenced, in the name of said Florence, a special proceeding in the Superior Court to have the Court ascertain, adjudge and determine the heirship of said Thomas H. Blythe and the ownership of his estate, and, in substance, that she, said Florence, was the daughter and sole heir of said Blythe, and entitled to inherit his estate.

These appellants, being summoned, appeared in said action or proceeding, denying and contesting the right of said Florence, and claiming for themselves to be the heirs of Blythe. Said proceeding was on said Perry's petition alone.

Thereafter, such proceedings were had in said Court in said special proceeding that it was for the first time made to appear to the Court, upon the record, that said Florence was an illegitimate child; that she was born in England, and that neither she nor her parents had ever been within the United States, or eligible to become citizens thereof, until after the death of said Thomas H. Blythe.

And the bill alleges (page 62) that when it was so made plainly to appear to said Court that said Florence was a non-resident alien until after the death of said Thomas H. Blythe and descent cast, and that she was not his heir, it was the duty of said Court to dismiss the petition or complaint, or both, of said Florence, in so far as the title and descent of the above described real property was involved, for want of jurisdiction.

On the trial of said proceeding, Florence attempted to prove that the said Thomas H. Blythe, while he was in California, and while she was in England, attempted to legitimate her by adoption, under Section 230 of the Civil Code, or to institute her as his heir, under Section 1387 of the Civil Code.

And the bill alleges that said Court, without any jurisdiction so to do, decided that said Thomas H. Blythe had, in his lifetime, adopted and legitimated the said Florence, by holding and deciding that Sections 230 and 1387 of the Civil Code of California operated upon said Florence while an alien and residing in England, and gave power to said Blythe to adopt her and make her his heir while said Florence was in England and said Blythe was in California.

And the bill alleges that from said judgment these appellants appealed to the Supreme Court of the State, and in that Court the cause was argued and the judgment appealed from was affirmed, but without jurisdiction so to do, for the reasons herein stated, and without considering the questions herein presented.

And the bill alleges, that on June 18, 1894, said Florence filed in the Superior Court, in the matter of the

estate of Thomas H. Blythe, deceased, her petition, for distribution, praying for an ordr of said Court distributing to her the real property above described, to which she alleged herself to be entitled only by descent as sole heir-at-law and next of kin to said Thomas H. Blythe, deceased.

In her said petition, it was made plainly to appear to said Court that said Florence, petitioner, was a non-resident alien, in which capacity alone she claimed said property, and that she had never been in the United States until after descent cast, at which time she was a non-resident alien.

And the bill alleges that it was then the duty of the Court to dismiss her said petition for distribution, in so far as the title and descent of the above described real estate was involved, for want of jurisdiction.

And afterwards the Court, without right or jurisdiction so to do, heard said petition for distribution, and granted a decree of distribution, and a document which falsely purported to be a decree of distribution of nearly all the property of said Thomas H. Blythe to said Florence, embracing all the real property above dscribed, was signed by the Judge of said Court and filed with the Clerk, and on the next day thereafter was recorded in the minufe book of the Court.

And the bill alleges, that said decree of distribution was null and void for want of jurisdiction in said Court to make the same, for the following reasons, among others:

Section 671 of the Civil Code of California, reading as follows: "Every person, whether citizen or alien, may

"take, hold and, dispose of property, real or personal, "within this State," was null and void as to aliens, and Section 672 of said Civil Code, which reads as follows: "If a non-resident alien takes by succession, he must "appear and claim the property within five years from "the time of succession or be barred," under which alone she claims title, is also void as to aliens, and especially as to said Florence:

That said sections, and each of them, is an encroachment upon, and an invasion and violation of, and a substitution for, the treaty-making power of the United Staes, and, if enforced, operate as treaty provisions between the State of California and all foreign governments, and were, and each of them is, void and in conflict with, and forbidden by, Section 10, Article 1, of the Constitution of the United States, and with the treaty-making power thereof, and in violation of and in conflict with Section 1978 of the Revised Statutes of the United States, and both of them are, and each of them is, in excess of the jurisdiction of the State of California to enact, and of the Courts of California to enforce; that said judgment or decree awarding said real property to said Florence on her petition alone, as was done, has no other legal support or justification than said sections of the Code of California, which are void so far as they apply to aliens, and particularly to said Florence, for the reasons that they violate the Constitution and laws and treaties of the United States, and because California and her Courts have no jurisdiction to enact or enforce said statutes, or either of them, as to aliens, and said statutes violate, and each of them violates,

and is forbidden by, the Constitution of the United States, the treaty-making power and existing treaties of the United States, and said judgment or decree in execution of said statutes is void.

And the bill, continuing, alleges that none of the constitutional or other objections aforesaid to the jurisdiction of said Court or the validity of said statutes, as applicable to said Florence, were decided or considered by the Court upon the hearing of said petition for distribution; That the judgment of said Superior Court, awarding said property to said Florence was further without jurisdiction, for said Court held, adjudged, and decreed that said Blythe's alleged action under Section 1387 of the Civil Code of California, reading as follows: "Every illegitimate child is an heir of " the person who, in writing, signed in the presence of " a competent witness, acknowledges himself to be the " father of such child," operates, and did operate, upon said Florence in England, and outside of, and beyond, the geographical jurisdiction and boundaries of the State of California, and said Court adjudged and held that said statute and said action operated to change and fix the social, political and legal status of said Florence while an illegitimate alien, as she then and there was, residing in England at the time of descent cast and always prior thereto.

And the bill alleges (page 67), that said Section 1387 does not operate beyond the geographical boundaries of the State of California, and it had no operation or effect at any time in the Kingdom of Great Britain, nor did any alleged action under it; and it had no operation

upon said Florence or her right to said real property at the time of descent cast or prior thereto, nor did said judgment so operate; that said Section as construed by the Court was and is against Article I, Section X, of the Federal Constitution, and an invasion of the jurisdiction of international intercourse between the United States Government and the Government of England, which jurisdiction is exclusively with the United States, and was and is unconstitutional and void because thereof, and because of a lack of power and jurisdiction in California or its Courts to give said statute the operation which it was adjudged by said Court to have, and invades the treaty-making power of the United States, and said section is in violation of Section 1978 of the Revised Statutes of the United States, and the rights of complainants.

That said judgment is a fraud upon the laws of the United States, and upon complainants, and is therefore void.

And the bill further alleges, that, on the 21st day of September, 1892, said Florence was married to Frederick W. Hinckley, and has taken the name of Florence Blythe Hinckley, and she is sued herein under said name, and her husband is now dead, and complainants now make no claim against him.

And the bill alleges (page 60), that after the death of said Thomas H. Blythe, the Public Administrator of the City and County of San Francisco took charge of the estate of said Blythe, and entered upon the administration of the same. But (page 70-1), since the filing of the original bill, to wit: December 4, 1895, said Florence

has secured possession of said property and the said rents, and the whole thereof, through said pretended judgments and decrees aforesaid, and without any other or further right than as above set forth, and she is now in possession of the same.

And the bill alleges (page 71), that Sections 671, 672, and 1387 of the Civil Code of California, through which, and not otherwise, said Florence claims title to said real property, are and each of them is in conflict with existing treaties between the United States of America and Russia, and Switzerland, and France, and England, and against the Constitution of the United States in the particulars hereinbefore mentioned, as well as the Fourteenth Amendment thereto, which limits the jurisdiction of the United States to its own citizens.

The prayer of the bill is, that the Court adjudge and decree (page 75), that appellants were, and are, the heirs at law of the said Thomas H. Blythe, deceased, and as such heirs did inherit his real estate above described, and that defendant has not, and never had, any title thereto, as heir at law of said Blythe or otherwise; and that appellants' title be quieted by the decree of their Honors, the Judges of said Circuit Court; and that appellants be let into the possession thereof.

There is no treaty provision between the United States and Great Britain granting to British subjects the right to inherit land in the Unied States.

From the foregoing facts, it is apparent that the questions in the case are:

Whether the State of California has the power to extend to non-resident aliens the right to inherit real es-

tate in California, in the absence of a treaty provision to that effect between the United States and the country of such alien?

Whether such a State statute, permitting aliens to inherit, is not in direct violation of Section 10, Article I, of the Constitution of the United States, which reads as follows: "No State shall enter into any treaty, alli-" ance, or confederation"?

Whether such a statute is not an invasion of the treaty-making power of the United States, and therefore void?

Whether such a statute, enacted by a State, extends its virtue outside of the United States and into the heart of a foreign country, so as to give heritable blood to an illegitimate alien who has always been there residing up to the moment of descent cast?

Whether said alien, coming to the United States for the first time after descent cast, and coming into the State of its enactment, has, among the "*civil rights*" to which he may be entitled, the right to apply to the Courts of the State to enforce his claim, that he, while an alien, and in a foreign land, did inherit real estate by virtue of the statute of said State?

Whether such a demand (so based on the theory that a State has usurped the province of the treaty-making power) is one of the civil rights which an alien may apply to the State Courts to enforce?

Whether such a demand is not essentially a national political question?

Whether the State Court is not wholly without jurisdiction to pass upon or examine into such political question?

Whether the suit of said alien is not *coram non judice?*

Whether the statute under which the alien applies, being void, or the question of its validity being a political question, it is not the duty of the Court to refuse to proceed, and to dismiss the whole matter out of Court?

Whether, where the Court proceeds and treats the statute as valid and decrees the estate to the alien, such a decree is not wholly and absolutely void?

These questions all cluster about the main question—whether the United States Constitution does not prohibit the State from making any law giving to aliens the right to inherit land or to legitimate illegitimate persons, subjects and residents of other countries?

If, as we assert the fact to be, a State has no power to extend those rights to aliens, any statute of the State which, by words or construction, assumes to effect that end is void, and any suit brought by a non-resident alien in the State Courts to assert and enforce the operation of such a statute and obtain land, claimed by him by succession, is *coram non judice.*

For a number of years the declaration that a State has the right to regulate the rules of descent and succession in its own territories has been repeated many times.

We need not here combat that, as a general proposition. It is true enough as regards the citizens of the State itself, but it fails whenever it comes into repugnance with the Constitution of the United States or Section 1978 of the Revised Statutes of the United States.

As was said in the case of Baker *vs.* Portland, 5 Sawyer. 566, where the claim was advanced that the State of Oregon has the inherent right to provide by statute whom it would and would not employ to work upon the public streets—having passed a statute that no Chinese should be employed—while the general ruie was conceded, yet the statute was overthrown, the Court saying—

> " yet the State, being a member of the Union, and
> " subordinate to the Constitution, laws, and treat-
> " ies of the United States in the exercise of its pow-
> " ers, it may be restricted in the exercise of this
> " right in particular instances, by the operation of
> " such Constitution, laws, or treaties."

And it was adjudged that said statute of Oregon was void, because it prevented the Chinese from making a living here, a right which the treaty had guaranteed to them.

Therefore we say, that a State may have the right to regulate the succession of lands in its territory, yet it cannot extend to non-resident aliens the right to inherit, because the power to regulate that matter is, by the Federal Constitution, reserved to the general government.

---

## THE SUBJECT OF INHERITANCE.

The right to take by inheritance is not a natural right, such as is the right to life, liberty, and property.

When it exists, it is a right provided by affirmative law.

There is no such thing as a natural law of inheritance.

2 Blackstone, 11.

It is incumbent on the party claiming, to establish his right affirmatively.

Therefore, in order to be enabled to inherit, the person must show some positive law enabling him to do so.

> "In case of a descent, the law takes no notice of
> "an alien heir, on whom, therefore, the inheritance
> "is not cast."
>
> Jackson ex dem. Gavensvoort *vs.* Lunn, 3 Johns. Cas., 109.

Aliens are not heirs; the law casts the descent on the next heir having heritable blood, passing by the alien as if not in existence.

> Orr *vs.* Hodgson, 4 Wheat., 453.

It is a well-recognized law that an alien cannot take a title to real estate by descent, as he can by purchase.

> Elmendorff *vs.* Carmichael, 14 Am. Dec., 87.
> Fairfax *vs.* Hunter, 7 Cranch., 619.

In the United States the right to take by inheritance finds its creation only in affirmative statutes.

The rights of succession enjoyed by American citizens are not of the same inherent inalienable character as their rights to life, liberty, and the pursuit of happiness.

When that right is ours, it is because some sufficient law conferred it on us.

If that is so with American citizens, it must be so—as to our lands—with aliens.

---

## ALIEN'S INABILITY TO INHERIT LANDS.

1 Blackstone Com., *372.

"If an alien could acquire a permanent property
" in land, he must owe an allegiance, equally per-
" manent with that property, to the King of En-
" gland, which would probably be inconsistent
" with that which he owes to his own natural liege
" lord; besides that thereby the nation might in
" time be subject to foreign influence, and feel
" many other inconveniences. * * * Yet an
" alien may acquire a property, in goods, money
" and other personal estate, or may hire a house
" for his habitation; for personal estate is of a
" transitory and movable nature; and besides, this
" indulgence to strangers is necessary for the ad-
" vancement of trade."

No Act of Congress has ever conferred upon aliens the right to take lands by succession.

On the contrary, there is an Act of Congress which gives to citizens of the United States the right to inherit in every State, viz.:

Rev. Stats. U. S., Sec. 1978. "All citizens of the
" United States shall have the same right in every
" State and Territory as is enjoyed by white citi-

"zens thereof *to inherit*, purchase, lease, sell, hold,
"and convey real and personal property."

By implication, this statute affirmatively cuts off aliens.

"But an alien cannot take lands by descent, nor
"transmit them to others as his heirs by the com-
"mon law and in Massachusetts, upon the death
"of an alien intestate, his lands formerly vested at
"once in the Commonwealth."

1 Washburn on R. P., Sec. *49, p. 79.

"Though an alien can take by purchase or de-
"vise, which is taking by act of the parties, as con-
"tradistinguished from taking by operation of law,
"and can hold until office found, yet the law will
"not enable him to transmit by hereditary de-
"scent."

Mooers *vs.* White, 6 John. Ch., 360-5.

How, then, is the right to inherit land in the United States to be conferred upon aliens?

We contend that the treaty-making power of the general government alone has that right.

We insist that the States have no power whatever to deal with the subject.

## THE SUBJECT OF INHERITANCE OF REAL PROPERTY BY ALIENS IS STRICTLY WITHIN THE TREATY-MAKING POWER OF THE UNITED STATES.

It was said in Geoffroy *vs.* Riggs, 133 U. S., 266 "That "the treaty power of the United States extends to all "proper subjects of negotiation between our Govern- "ment and the Governments of other nations is clear. "It is also clear that the protection which should be "afforded to the citizens of one country owning prop- "erty in another, and the manner in which that prop- "erty may be transferred, devised, or inherited, are fit- "ting subjects for such negotiation and of regulation "by mutual stipulations between the two countries," *et seq.*

In the Head Money cases, 112 U. S., 598, the Court said: "But a treaty may also contain provisions which "confer certain rights upon the citizens or subjects of "one of the nations residing in the territorial limits of "the other, which partake of the nature of municipal "law, and which are capable of enforcement as be- "tween private parties in the Courts of the country. "An illustration of this character is found in treaties, "which regulate the mutual rights of citizens and sub- "jects of the contracting nations in regard to rights "of property by descent or inheritance when the in- "dividuals concerned are aliens."

In the case of Wunderle *vs.* Wunderle, 144 Ill., at pages 53-4, the Court declares that the subject of regulating the rights of aliens to inherit real estate is di-

rectly within the treaty power of the General Government.

In this very State, as early as 1855, in the case People *vs.* Gerke, 5 Cal., 382, the Court directly adjudged that the power to extend to aliens the right to inherit lay clearly within the treaty-making power of the United States, and was therefore forbidden to the States.

The political history of this nation shows a large number of instances where the United States has, by treaty, conferred upon aliens, citizens or subjects of certain nations, limited rights of succession; limited because in each case the treaty contemplated and provided that the alien should "*dispose of the property and remove the proceeds*" within some reasonable time named.

Never has the United States granted to any aliens the treaty right to come and take lands by succession and reside on them forever.

Perhaps one exception should be made to the last allegation, viz.: the Ninth Article of the Jay Treaty, consummated in 1794, which provided that all citizens or subjects of either country who *then held* lands in the territory of the other, should continue to hold them, and might grant, sell or devise the same to whom they pleased in like manner as if they were natives, "and " that neither they nor their heirs or assigns shall, so " far as may respect the said lands and the legal reme- " dies incident thereto, be regarded as aliens."

That article of the treaty was construed in Blight's

Lessee *vs.* Rochester, 7 Wheaton, 535, where it was held that *it expired with the lives of those then in being.*

Crane *vs.* Reeder, 21 Mich., 66.

It is not now in operation.

---

## THAT WAS THE ONLY TREATY PROVISION EVER ENTERED INTO BETWEEN GREAT BRITAIN AND THE UNITED STATES UPON THIS SUBJECT.

But, as we have before said, the LIMITED right to take by inheritance, coupled with the necessity to dispose of the same and remove the proceeds, has been often extended to subjects of certain countries, by treaty; *but never to Great Britain.*

According to the terms of our treaty with AUSTRIA, concluded in 1848, it is, in Article I, provided, that an Austrian subject may succeed to *personal* property in this country, and Article II provided, that,—

> " Where, on the death of any person holding real
> " property, or property not personal, within the
> " territories of one party, such real property would,
> " by the laws of the land, descend on a citizen or
> " subject of the other, were he not disqualified by
> " the laws of the country where such real property
> " is situated, such citizen or subject shall be *allowed*
> " *a term of two years to sell* the same, which term
> " may be reasonably prolonged, according to cir-
> " cumstances, and to withdraw the proceeds there-
> " of, without molestation, and exempt from any

"other charges than those which may be imposed
"in like cases upon the inhabitants of the country
"from which such proceeds may be withdrawn."

Article II of our treaty with the GRAND DUCHY OF HESSE, concluded in 1868, provides:

"Where, on the death of any person holding real
"property within the territories of one party, such
"real property would, by the laws of the land, de-
"scend on a subject or citizen of the other, were
"he not disqualified by alienage, such citizen or
"subject shall be allowed *a term of two years to sell*
"*the same*, which term may be reasonably pro-
"longed , according to circumstances, and to with-
"draw the proceeds thereof, without molestation,
"and exempt from all duties of detraction on the
"part of the Government of the respective States."

By Article II of our treaty with SAXONY, a subject of Saxony is permitted to take real property by inheritance in the United States, and is allowed *two years* from the descent cast in which to *sell it* and withdraw the proceeds.

By Article II of our treaty with WURTTEMBERG a subject of that country is permitted to take land by inheritance in the United States, and is allowed the *term of two years* to sell it and withdraw the proceeds.

Article XII of our treaty with ECUADOR provides:

"And if in the case of real estate said heirs
"would be prevented from entering into the pos-
"session of the inheritance on account of their
"character of aliens, there shall be granted to

"them *the term of three years* to dispose of the same "as they may think proper, and to withdraw the "proceeds without molestation, nor any other "charges than those which are imposed by the "laws of the country."

By Article VII of our treaty with the HANSEATIC REPUBLICS, it is provided, "* * * and if, in the "case of real estate, the said heirs would be prevented "from entering into the possession of inheritance on "account of their character of aliens, there shall be "granted to them *the term of three years* to dispose of "the same," etc.

In Article V of our tretay with the DOMINICAN REPUBLIC, it is provided:

> "When on the decease of any person holding "real estate within the territory of one party, such "real estate would by the law of the land descend "on a citizen of the other, were he not disqualified "by alienage, *the longest term which the laws* of the "country in which it is situated *will permit* shall be "accorded to him to dispose of the same"; * * *

By Article XII of our treaty with BOLIVIA, it is provided, "* * * And if in the case of real estate, "the said heirs would be prevented from entering into "the possession of the inheritance on account of their "character of aliens, there shall be granted to them the "*longest period allowed by the law* to dispose of the same "as they may think proper, and to withdraw the pro- "ceeds, without molestation, nor any other charges "than those which are imposed by the laws of the "country."

According to our treaties with certain other nations, their subjects (being permitted to inherit real property here), are allowed *a 'reasonable time'* within which to sell the same and remove the proceeds; as, for example, The Hawaiian Islands, Portugal, Mecklenburg-Schwerin, Prussia, Russia, and Spain.

In our treaty with SERBIA, in 1881, the United States agreed, in Article, II that—

> "In all that concerns the right of acquiring or "possesing or disposing of every kind of property, "real or personal, citizens of the United States in "Serbia and Serbian subjects *in the United States*, "shall enjoy the rights which the respective laws "grant or shall grant in each of these States to the "subjects of the most favored nation."

In our treaty with NEW GRENADA, concluded in 1846, by Article XII, it is provided:

> "The citizens of each of the contracting parties "shall have power to dispose of their personal "goods or real estate within the jurisdiction of the "other, by sale, donation, testament or otherwise; "and their representatives being citizens of the "other party shall succeed to their said personal "goods or real estate, whether by testament or *ab* "*intestato*, and they may take possession thereof "either by themselves or others acting for them, "and *dispose of the same by will*, paying such duties "only as the inhabitants of the country wherein "said goods are, shall be subject to pay in like "cases."

Article II of our treaty with BARVARIA, concluded in 1845, provdes:

"Where, on the death of any person holding real
"property within the territories of one party, such
"real property would, by the laws of the land, de-
"scend on a citizen or subject of the other, were he
"not disqualified by alienage, such citizen or sub-
"ject shall be *allowed a term of two years* to sell the
"same, which term may be reasonably prolonged,
"according to the circumstances, and to withdraw
"the proceeds thereof, without molestation, and
"exempt from all duties of *detraction*."

It is thus apparent that the treaty making power of the United States does extend to conferring upon aliens the right to inherit real estate in this country;

And it is plain that the treaty making power has done so very many times.

The validity of such treaty provisions and their prevailing effect over any State statute contrary thereto, have been decided a very many times.

Some the States have statutes forbidding inheritance by aliens, and cases have come before the Courts in those States, involving the claim of certain aliens—coming from countries with which the United States has made treaty provisions allowing limited inheritance—that they have succeeded to the lands in question.

In every one of those cases the treaty has prevailed over the statute, which has been pronounced void.

It was held in Adams *vs.* Akerlund, 168 Ill., 632, that:

The disqualification to inherit real property imposed by the Illinois Act of 1887 upon non-resident aliens is removed wherever there is a treaty between the United

States and the country of such aliens conferring the right to take or hold or transfer real estate.

In Opel *vs.* Shoup, 100 Iowa, 407, it was held that the treaty between the United States and Bavaria permitting subjects of the latter nation to take by inheritance, and allowing them two years to sell the property and withdraw the proceeds, rendered void a statute of Iowa prohibiting inheritance by aliens.

But the proposition which we assert goes beyond the mere *superiority* of treaty provisions over State statutes in this regard.

We assert that the *treaty power is exclusive.* THE STATES HAVE NO POWER TO TAKE ANY ACTION WHATEVER REGARDING THE RIGHTS OF ALIENS TO INHERIT LAND.

In the structure of our Government and the distribution of the several functions between the Central Government and the States, "the powers which one pos-
" sesses the other does not."

U. S *vs.* Cruikshank, 92 U. S., 550.

But the conclusive reason is, that the Federal Constitution itself, in express words, prohibits the States from invading the treaty making power.

By the expression "treaty making power," we mean all that is meant in the three words used in Article I, Section 10, of the Constitution, viz.: *treaty, alliance or confederation.*

Those three words cover the entire area of foreign relations, and no State can take any part in anything which has to do with the foreign relations of the United States.

In a learned opinion delivered in the case of Holmes *vs.* Jennison, 14 Peters, Chief Justice Taney expressed the very proposition we are here asserting, which opinion was expressly approved by this Court in U. S. *vs.* Rauscher, 119 U. S., 414.

That was a case where a man, Holmes, charged with crime in Canada, had escaped into Vermont, and the Governor of Vermont, acting on State authority alone, was about to surrender Holmes to the Canadian officers. Holmes claimed that under Article I, Section 10, of the Constitution the States cannot exercise the power of extradition.

Chief Justice Taney upheld that contention on the ground that, under that section of the Constitution, the States are excluded from the entire field of foreign relations.

He says (Holmes *vs.* Jennison, 14 Peters, 569):

"The power to make treaties is given by the Con-
" stitution in general terms, without any descrip-
" tion of the objects intended to be embraced by it;
" and, consequently, it was designed to include all
" those subjects, which, in the ordinary intercourse
" of nations, had usually been made subjects of ne-
" gotiation and treaty; * * *

" All the powers which relate to our foreign in-
" tercourse are confided to the General Govern-
" ment. * * *

Page 574: " The framers of the Constitution
" manifestly believed that any intercourse between
" a State and a foreign nation was dangerous to
" the Union; that it would open a door of which
" foreign powers would avail themselves to obtain

"influence in separate States. Provisions were "therefore introduced to cut off all negotiations "and intercourse between the State authorities "and foreign nations. If they could make no "agreement, either in writing or by parol, formal "or informal, there would be no occaasion for ne- "gotiation or intercourse between the State au- "thorities and a foreign Government.

"Hence, prohibitions were introduced, which "were supposed to be sufficient to cut off all com- "munication between them.

"But if there was no prohibtion to the States, "yet the exercise of such a power on their part is "inconsistent with the power upon the same sub- "ject conferred upon the United States. * * *

"The exercise of the power in question by the "States is totally contradictory and repugnant to "the power granted to the United States. * * *

"What avails it that the general government, in "the exercise of that portion of its power over our "foreign relations, which embraces this subject, "deems it wisest and safest for the Union to enter "into no arrangements upon the subject, and to "refuse all such demands; if the State in which "the fugitive is found may immediately reverse "this decision, and deliver over the defendant to "the Government that demands him? If the "power remains in the States, the grant to the "general government is nugatory and vain; and "it would be in the power of any State to over- "turn and defeat the decisions of the general gov- "ernment, upon a subject admitted to be within "its appropriate sphere of action, and to have "been clearly and necessarily included in the "treaty making power."

On page 576, the Court declares that the power of the United States in this respect, "from its nature, can "never be dormant."

A very little consideration will show the mischief which might eventually result result from the exercise of these powers by the several States regarding inheritance of land by aliens.

Each State would make laws to suit itself; they would not need to harmonize with the laws of other States, nor with the laws or policy of the federal government.

Different States could make widely different laws.

One State might grow partial to one nation or nations to the prejudice of others, and could readily make discriminating provisions upon the subject of inheritance by aliens.

One State might enact liberal provisions in favor of one nation and exclusion as to the rest, or it might exclude specific nations. Religious intolerance could readily find expression in the excluding from rights of inheritance subjects of Catholic countries; or several States could, by combined action, wield great power in these matters, so that the uniformity of federal power would be disconcerted and broken up, a result leading to the dismemberment of the Union.

Again, if every State, or any State, is permitted to legislate on this subject, its action *quo ad* property within its own borders, would operate to add to and thus modify as many treaties which the United States has entered into as are not exactly similar to its own enactment.

For instance, take this case, of a statute which permits all aliens to take freely without terms or conditions. If it be sustained, what is its effect? As to every treaty made by the United States granting to certain nations the right to take land by inheritance and dispose of the same and remove the proceeds, this statute grants further rights in California.

Whereas, by a given treaty, the alien must dispose of it and remove the same in one, two, or three years, California kindly strikes out the time limit and invites the alien to come and stay and hold the land.

As to nations to which no such privilege has been granted by treaty—has been refused, perhaps, for reasons of state policy—California blandly supplies the omission.

As to those nations who have secured for their subjects this privilege in a limited form by treaty, and who gave for it some valuable reciprocal concession, they would find that this valuable concession granted to them so sparingly by treaty is meanwhile being (in California) lavished upon all the world gratuitously.

Therefore, we say, such a state statute, if valid, would operate as an amendment to every treaty now existing between the United States and any foreign nation.

Counsel for appellee have already conceded in this case that, if the United States had entered into some treaty provision with Great Britain upon this subject, that would control; but they contend that the California law is proper until the Federal Government acts.

But the Federal Government *has already acted* in a

great many treaties, all applicable to California, where a qualified right to inherit has been given to many nations.

It has not been given to Great Britain.

So, if counsel's argument is good, the validity of the California statute has a checkered appearance. It is valid as to all those nations where there is no treaty provision, but as to all others it is void.

Our Courts are bound to presume that this Government has *refused* to make such a treaty provision with Great Britain.

This doctrine that a dormant Federal power may be exercised by the States is a false and exploded thing.

In Holmes *vs.* Jennison, 14 Peters, at page 576, Chief Justice Taney, after a long discussion of this subject, says that the power of the United States in this respect, "*from its nature can never be dormant.*"

The case, People *vs.* Curtis, 50 N. Y., 326, was an attempt on the part of New York's State Government, under an express statute of New York, to exercise the function of extradition of a criminal in favor of Belgium, and the effort was supported by the argument that the United States, in its treaty with Belgium, had left the feature of extradition unprovided for, and therefore the States could exercise that power. But the Court emphatically denied that proposition in the following words:

People *vs.* Curtis, 50 N. Y., 326:

"It is admitted by the Attorney-General that
"the general government possesses the power over

" the subject of extradition of fugitives from jus-
" tice, and that if it had exercised the power in re-
" gard to Belgium it would be exclusive, and that
" no one could be delivered except through the Fed-
" eral machinery; but he insists that this power is
" dormant as to all countries with which the Gov-
" ernment have made no treaty; that the States are
" not prohibited from exercising it, and that such
" exercise is not repugnant or inconsistent with the
" power conferred on the Government.

" This position is not tenable. It is true that
" a grant of power to the general government does
" not necessarily operate as a prohibition of the
" same power by the States. (Sturges *vs.* Crow-
" inshield, 4 Wheat., 122.) * * * This subject
" is not one of that character. The whole subject
" of foreign intercourse is committed to the Federal
" Government. Indeed, this was one of the prin-
" cipal purposes of the Union. As to foreign coun-
" tries, the States, as such, are unknown. The
" treaty making power is exclusive in the general
" government not only, but the States are prohib-
" ited from exercising it in express terms. So the
" appointment of embassadors and receiving em-
" bassadors from foreign countries are confided to
" the Union, and the States are prohibited from
" making any compact or agreement with any for-
" eign power. The Act of the Legislature under
" consideration authorizes foreign ministers and
" officers of foreign Governments to make a de-
" mand upon the Governor, and empowers him to
" treat with these ministers, and accede, in his dis-
" cretion, to their demand. It is patent that the
" exercise of such a power by the States may frus-
"trate the foreign policy of the Government, both
" as to countries with whom the Government has

"made a definite treaty, and as to those with
"which it has not.

"It has been the policy of the Government in
"later years to enter into extradition treaties with
"foreign nations; but the propriety of doing so in
"any particular case may depend upon a variety
"of circumstances known only to the officers of the
"Government.

"We cannot determine nor judicially know but
"that the Government, for reasons of public pol-
"icy connected with its negotiations, may have de-
"clined to enter into such a treaty with Belgium,
"the demanding country, or that country may
"have itself refused to make any such a treaty
"without some undue stipulation on our part. Is
"it to be tolerated that a State may overrule the
"decision of the Government, and thus embarrass
"its foreign negotiations, and, for that purpose,
"may the States receive and treat with foreign
"ministers?

"If one State may, all the States may make
"these arrangements, which arrangements may
"all differ from each other; and the same States
"may make different arrangements with each for-
"eign nation. The embarrassment which such an
"exercise of power by the States would produce to
"the general government in its foreign policy is
"obvious.

"The general government might adopt the pol-
"icy of refusing to make an extradition treaty with
"all nations, or it might refuse as to Belgium, or
"any other particular country.

"It cannot be said, from the absence of a treaty
"with any country or all countries, that the power
"is dormant. It may be as much exercised by re-
"fusing as by making a treaty.

"In the absence of a treaty we are to presume a "refusal or failure to make one on the part of the "Government. In either case, the power is not "dormant. The nature of the power is such that "it cannot be dormant. It is necessarily in active "exercise by the Government when acting or omit- "ting to act. The dormant powers are such as the "State may exercise over their own internal af- "fairs without colliding with the action or non- "action of the general government. Such is the "subject of Bankruptcy. * * *

"As to foreign intercourse, and all questions "relating thereto, the Government alone can speak "and act, and the power is therefore necessarily "exclusive."

Counsel are pleased to deride our assertion that this statute (671, Civil Code) is an invasion of the treaty making power.

They say, "California has made no treaty," and therefore there is nothing in our claim.

This same answer was made in the case of Holmes *vs.* Jennison, 14 Peters, 571, where, although admitting that the Governor of Vermont was about to turn over a fugitive to the Canadian authorities, yet they protested that Vermont had made no treaty with Canada.

But Judge Taney answered, that the contemplated action of the State was in the nature of an AGREEMENT, and, as such, came within the inhibition.

"Neither is it necessary, in order to bring the "case within this prohibition, that the agreement "should be for the mutual delivery of all fugitives "from justice, or for a particular class of fugitives.

"It is sufficient if there is an agreement to deliver
"Holmes. For the prohibition in the Constitution
"applies not only to a continuing agreement, em-
"bracing classes of cases, or a succession of cases,
"but to any agreement whatever.

"An agreement to deliver Holmes is, therefore,
"forbidden, and as much so as if it were an agree-
"ment to deliver all persons in the same predica-
"ment. Is there not, then, in this case, an agree-ment
"on the part of Vermont to deliver Holmes? And
"is he not detained in custody, to be delivered up,
"pursuant to this agreement?"

Applying that doctrine to this case:

An alien British subject filed in the California Court the claim, that California, by exercising the Federal prerogative belonging to the department of foreign relations, had invested her, while in England, with heritable blood and had changed her status, and thus enabled her to take this land by succession.

The State of California, through its judicial arm, has surrendered this land into her possession under said claim.

The claim was by a British subject. The form of pretended legal procedure, based on this void statute, was an agreement made by California with the other nation and the subject thereof, to surrender this land. It was an agreement; and California has agreed to surrender lands under similar circumstances every time.

The fact that the alien's application to the State for the land was made through the Courts, instead of through the Executive, does not help appellee; for, under the void statute, the Court had no jurisdiction to

act upon said Florence's petition, and its judgments and decrees were void.

---

## MOTION TO DISMISS.

The motion to dismiss was made under the law of 1875, which law provided against impositions upon the Court by improperly arranging the parties to suits, or by exaggerating the amount involved so as to give apparent jurisdiction. The law of 1875, providing for such motion to dismiss, did not constitute such motion a plea, answer, or demurrer in equity, under or upon which an issue of fact or law could be tried. Such motion did not put in issue a cause of action, or become a substitute for a demurrer. For, if demurrer be sustained to a bill in equity, complainant may amend, while, under the operation of a motion to dismiss, no amendment is allowed or can be claimed as of right. The motion presents the single question of jurisdiction.

If a Court has no jurisdiction to entertain a case, no issue can be raised, tendered or tried in the case. No plea, answer, or demurrer can call up or beget an issue in such a case. A motion to dismiss a case for want of jurisdiction raises no issue in the case on the merits, but denies the possibility of issues existing or being raised in the case, and removes it practically from the docket of the Court, without action of the Court, except for costs or appeal.

Opposing counsel wish now to treat the action of the Court below on the motion to dismiss for want of juris-

diction, as a trial by the Court below of the case itself. This cannot be. Certificate, paragraph 10, page 104 (side paging), of record, shows that the bill raised the issue whether the State of California had jurisdiction to grant land in fee simple to aliens by descent, in the absence of a treaty enabling the alien so to take. The Court below says that such an issue was raised and tendered by the bill, but that the said Court had no jurisdiction to even consider such issue. An appeal is taken from such decision. The single question on the motion to dismiss filed in this Court is, did the Court below have jurisdiction to decide the issue at all? Not whether it decided right, but had the lower Court jurisdiction? It is therefore respectfully suggested that the parties were citizens of different States, and that the requisite amount is involved, and that the land in controversy is situate within the Northern District of California. The foregoing facts are all that is necessary to give jurisdiction. Jurisdiction is determined from the allegations of the bill.

City Ry. Co. *vs.* Citizens' Ry. Co., 166 U. S., 562.

---

## THERE IS NO PLEA OF RES ADJUDICATA, OR OFFER OF THE STATE COURT RECORD IN EVIDENCE.

Counsel for appellee have not plead the proceedings in the State Court to sustain a plea of *res adjudicata;* no such plea is made; the only knowledge this

Court has of State Court proceedings, is what appellants state them to be, in the bills filed herein. Counsel for the appellee declined to plead to the bills filed herein, or to answer or to demur to them, but resorted to a motion to dismiss for want of jurisdiction, under the law of 1875.

The State Court of Califoria did not decide the constitutional question set up and plead in the bills filed herein, nor any of them. The bill states, on page 34 of the record (side page 67), that, "Your orators allege " that none of the constitutional or other objections " aforesaid to the jurisdiction of said Court or the va- " lidity of said statutes as applicable to said Florence, " were decided or considered by the Court upon the " hearing of said petition for distribution."

The truth of this allegation is admitted. It will be seen, also, on page 39 of the record, that appellants tendered, as a part of their third amended and supplemental bill, a complete statement that none of the questions raised in said bill had ever been passed upon by the State Court. This statement was made as a part of the bill offered, but the Court compelled appellants to eliminate said statement on objection thereto by appellee's counsel. Appellee seeks refuge on this topic in the case of Blythe *vs.* Ayres, 167 U. S., 746.

Appellants respectfully ask this Honorable Court to decide the scope and judicial use of a motion to dismiss under the law of 1875. It is respectfully submitted that such motion does not take the place in equity of appropriate pleadings. That a judgment of a Court of Equity dismissing a bill on such a motion, for want of

jurisdiction, is not the equivalent of a judgment by a Court of Equity dismissing a bill on a final hearing. Counsel for appellee in this case assume that in sustaining a motion to dismiss for want of jurisdiction in this case, the Honorable Court below decided the merits of the case, and all the equities therein involved, and that, therefore, appellants cannot appeal to this Court on the question of jurisdiction, but must go to the Court of Appeals on the merits, as though the whole case were tried on bill, answer, plea, or demurrer. Whereas, the law of 1875 contemplates a motion to dismiss when the Court is imposed upon by fictitious appearances of jurisdiction. When such motion is sustained, the merits of the controversy have not been reached or touched, because no merits within the jurisdiction of the Court were presented for decision. The only jurisdiction of the Court in such a case, the motion being sustained, is to adjudge the costs.

---

## THE VALIDITY OF THE JUDGMENT OF THE STATE COURT DESCRIBED IN THE BILL WAS NOT DETERMINED BY SUSTAINING THE MOTION TO DISMISS FOR WANT OF JURISDICTION.

Counsel for appellee, on page 47 of their brief, say:

> " We shall argue that the decisions of the State
> " Courts referred to in the bills are conclusive
> " against appellants' claim, and that the bills show
> " no valid ground for attacking or disregarding

"them; that the State laws permitting aliens to
"inherit, and in relation to the institution of heir-
"ship, are not in conflict with any treaty, or an
"invasion of the treaty making power, or in viola-
"tion of any federal provision, but are valid laws.
"That, even if it were otherwise, the decisions of
"the State Courts of Probate cannot be attacked
"in the present suit."

On page 48 of the brief, they say:

"We shall further argue that no constitutional
"question is involved in the case."

We respectfully submit that this Court cannot be asked in this appeal to decide anything in the case, except whether the Honorable Circuit Court did or did not have jurisdiction to take up the matters which counsel say they will now argue here. They cannot appeal to the original jurisdiction of this Court on the several topics suggested in their brief. The learned Circuit Court below, in its certificate (found on pages 52-53 of the record), says, that the questions which opposing counsel say they will argue here arose on the face of the bill, but that the Court had *no jurisdiction to decide them*, or either of them, and therefore did not decide them. Appellate jurisdiction is limited to correcting or affirming decisions of lower Courts actually made. The only question decided by the Honorable Court below was, that it had no jurisdiction to proceed at all. The bill, as finally amended, presented a controversy between citizens of different States. There is no suggestion that these parties are improperly or collusively made up in the third amended and supplemental bill, filed with

leave of Court without objection. The land in dispute lies within the Northern District of California; the said Court therefore had jurisdiction of the parties to the suit and of the subject matter thereof, but declined to hear the complaint presented for hearing, without plea, answer, or demurrer filed thereto.

---

## THE JUDGMENTS OF THE STATE COURTS OF CALIFORNIA WERE NOT HELD BY THE HONORABLE CIRCUIT COURT TO BE RES ADJUDICATA OF THE CONTROVERSY PRESENTED BY THE BILL.

Opposing counsel argue that the judgments of the State Court, mentioned in the bill, and as stated in the bill, were final of this contention. The learned Court below said, in paragraph 14 of its certificate, page 53, that the question of the effect of said judgments arose upon the allegations of the bill, but that the learned Court had no jurisdiction to decide it, and therefore did not decide it. The case cannot, therefore, be argued here as though the Court had, in fact, decided the effect of said judgments. The only question here presented on appeal is one of *jurisdiction* of the learned Court below. The legal effect of the judgments of a Court of record, when presented in evidence in a case being tried in another Court of record, can always be determined by the Court in which such judgments are offered in evidence. If the Court errs in determining the legal significance of such judgments when offered

in evidence, an appeal will lie to a proper Court on such error; but the Honorable Court in this case refused to decide the legal significance or effect of the judgments of the State Court, for want of jurisdiction so to decide. Opposing counsel present a brief to this Honorable Court, on the assumption that this Court is dealing originally with the cause of action presented in the bill, whereas the learned Court below declined to exercise its power to try the case or to consider the cause of action stated in the bill, for want of jurisdiction to consider it.

As an illustration, the Court says, in paragraph 9 of the certificate (side page 104), that the question arose upon the allegations of the bill, "and the construction " and application of the Constitution of the United " States with respect thereto, whether this Court had " jurisdiction to entertain said suit."

The Court decided it had *no jurisdiction.*

This decision is not the equivalent of holding that the Constitution of the United States, or its application or construction, was or was not involved; but it is a decision pure and simple that the learned Court below had no jurisdiction to decide, and, therefore, would not decide and did not decide, whether or not the Constitution of the United States, its application or construction, was, in fact, involved.

## IT DOES NOT MATTER FOR THE PURPOSE OF JURISDICTION IN THIS CASE WHETHER A FEDERAL QUESTION WAS OR WAS NOT INVOLVED.

Opposing counsel seem to argue that, in order to give the Circuit Court jurisdiction, the controversy presented must be between citizens of different States, and involve the requisite amount, and also that there must be added thereto a Federal question; and, furthermore, that such Federal question must be presented with such conclusiveness that it is judicially impossible for the Court to decide against complainant's view of the Federal question. The argument seems to assume that if such a case is not presented, the Circuit Court has no jurisdiction, and the case may be summarily dismissed on motion, for want of jurisdiction; that the Court is not required to deliberate upon the claim made by complainant if it lack such conclusiveness, but may dismiss it peremptorily. Counsel's position rests upon the theory that if the judgment of the State Court, void on its face, is offered in evidence in a Federal Court, that such judgment must be respected equally with a valid judgment of a State Court, unless it can be shown that such void judgment has been reversed on a writ of error from the Supreme Court of the United States; and that, if the bill shows that a judgment of a State Court has been rendered at all, relating to the subject matter of the bill, though not on the issues presented by the bill, and though void on its face, yet the bill setting up such a state of facts may be dismissed for want of jurisdiction;

that the Court has no jurisdiction to touch the case, except to dismiss it.

---

IF, HOWEVER, THE MERITS AND ISSUES PRESENTED IN THE BILL ARE TO BE HERE TREATED AND EXAMINED AS THOUGH TRIED BELOW, IT IS PROPER TO CONSIDER THEM IN THEIR ORDER.

The first question presented is the alleged right of Florence Blythe to sue in the Superior Court of California for the real estate described in the bill. The question is, can the Legislature of California bring the power of the Government into action on this subject? Can California vest the right to permanent title in land, and permanent residence in the country, in a non-resident alien owing no allegiance to the country? Florence Blythe was still in England when her alleged right of succession vested. She came to the United States for the first time after descent cast, and began her litigation after she arrived here.

The subject matter of the proceeding in the State Superior Court was the claim of Florence to the real estate described in the bill. By jurisdiction of the subject matter, is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the Court, and is to be sought for in the general nature of its powers, or in authority specially conferred.

Cooper *vs.* Reynolds, 10 Wall., 316.

The question lying at the base of this contention is, does the sovereignty of California embrace power to bestow the land within her borders upon non-resident aliens, despite the general government. For what the State has power to do, the general government cannot prevent being done. If not, the Courts of California cannot do it. The judicial power of the State does not reach beyond the sovereignty of the State. The whole government of the United States is divided into two hemispheres, State and Federal. The powers residing in the Federal hemisphere are denied to the States.

If a State attempt to use a power lying within Federal sovereignty, such attempted use is nugatory, no matter with what apparent solemnity its attempted uses be clothed. The forms of State decrees, Court seals and attendant judicial ceremonies are legally lifeless unless the decree renderd has its root in the sovereignty of the State.

It seems extraordinary that, at this late day, opposing counsel deride the proposition that the Federal Government possesses exclusive sovereignty over all diplomatic concerns, or that a State Court cannot make a binding decree of title to real property to a non-resident foreign subject, based upon the State's grant of the right of succession to such alien. The so-called decree of distribution was rendered on Section 671 of the Civil Code of California, which reads as follows:

> " Any person, whether citizen or alien, may take,
> " hold, and dispose of property, real or personal,
> " within this State."

Take this statute away, and the thread of Florence's alleged title is cut.

The personal rights of an alien to protection in this country are not identical or coincident with his right to take and hold land in fee simple equally with a citizen.

While Courts of the country are, by the law of nations (not the law of a State), and by the Constitution of the United States and the Fourteenth Amendment thereof, thrown open to all persons to seek personal protection therein, neither international law nor the Federal Constitution gives to aliens the right to hold land by descent in the country and live thereon forever. Protecting an alien personally while in the country is one thing; giving him a grant of land in fee simple by act of law, is quite another thing.

Story's Equity Pleading, Sec. 54, says: "But, al- "though an alien friend is not incapacitated to sue in "Courts of Equity, yet this doctrine is to be under- "stood in a limited sense, that he is thereby under no "personal disability to sue. Still, the subject matter "of the suit must be such as will entitle him, as an "alien friend, to maintain it; for if it respects land or "any demand of a mixed nature, partly real and partly "personal, he may not be so entitled."

Coke upon Littleton, p. 129, B. Vol. 1, says: "And "true it is that an alien enemy shall maintain neither "real nor personal action, that is, until both nations be "at peace, but an alien that is in league shall maintain "personal actions, for an alien may trade and traffic, "buy and sell, and, therefore, of necessity, he must be

"of ability to have personal actions, but he cannot "maintain either real or mixed actions."

Counsel for appellee confound the right of an alien to personal protection while sharing the international hospitality of the country, with the right of alien to own the country in fee simple, and to reside therein forever. If a gentleman invite a guest to his house, and protect him while there, it does not follow that the guest is thereby made eligible to have a deed to the property.

A Court has no jurisdiction to permit its processes to be used by an alien, except to vindicate the civil or personal rights which that alien has.

Having no right to inherit land, the Court cannot extend to him its process to recover, as inherited, that which he cannot inherit.

The alien must have the legal right to that which lies behind the process, and gets no right in the process itself.

Any petition filed by him to recover land under claim of succession, is void on its face if it show that he is an alien; and any judgment recovered thereon by such an alien is void on its face.

---

## STATE PROCEEDINGS.

The proceeding in the State Court was on the petition of Florence alone (side page 62 of record).

This was a special proceeding, resting upon Florence's petition alone, filed by an alien guardian.

Said Florence was compelled to recover, if at all, on the strength of her own title. This title did not depend upon the action or presence of any other claimant.

This title depended on the validity of Section 671 of the Civil Code, applicable to non-resident aliens.

This was her *enabling Act*, if there was any.

If this section breaks down, her claim under it breaks down also.

The defendants—these appellants—filed no petition of their own, but contested that of Florence.

No other pleading was before the State Court but hers. This gave no jurisdiction to the Court to adjudge anything in her favor, but her petition should have been dismissed.

---

## SECTION 1664, C. C. P., DOES NOT APPLY TO NON-RESIDENT ALIENS.

It is true that Section 1664 of the Code of Civil Procedure, set out in appellee's brief, is general in its terms, and does not limit the right to appear and claim real estate thereunder to citizens of the United States; but the Constitution and laws of the United States, and all the limitations therein contained upon the power of the State of California, are just as much a part of said Section as though written therein; and when read under such limitations said section permits only citizens of the United States to file a petition thereunder; and, positively, by virtue of such limitations, excludes an alien from the right so to do.

A State statute, though general in its terms, includes only the persons over whom the State has jurisdiction. A petition filed under said section by an alien is not agreeable to said section, but in conflict with it.

Statutes derive their force from the authority of the Legislature which enacts them, and hence, as a necessary consequence, their authority as statutes will be limited to the territory or country to which the enacting power is limited.

It is only within these boundaries that the Legislature is lawmaker, that its laws govern people, that they operate of their own vigor upon any subject. No other laws have effect there as statutes. Statutes of other States, or national jurisdictions, are foreign laws, of which the Courts do not take judicial notice. They may be proved and taken into consideration in proper cases, subject to the provisions of domestic statutes and of the Constitution; but they are so considered only by principles of the common and international law, originating in the comity which exists between nations, and by force of the Federal Constitution betwen the States of the Union.

Bank of Agusta *vs.* Earl, 13 Peters, p. 519.
Sutherland on Statutory Construction, p. 12.

---

## NO DECISION HAS EVER BEEN MADE UPON THE FEDERAL QUESTION HERE INVOLVED.

The brief for appellee, at page 66-7, says:

"The very question which the appellants seek to
"agitate has long ago been settled by the repeated

"decisions of this Court, as we now proceed to "show."

Before taking up the cases which are cited on this point, we ask the Court to remember that in the early history of this country the doctrine of States' rights was much more obstinately fixed in the judicial mind than at present; and that later decisions have more clearly and satisfactorily distinguished between the respective powers of the States and the Federal Government.

Now, we propose to show in a few words that each authority cited by counsel fell short of involving the present Federal question.

The case of Chirac *vs.* Chirac, 2 Wheaton, 269, did not involve the question whether a State has the power under the Constitution to regulate the right of aliens to inherit land.

In that case, a man died in Maryland, leaving heirs in France; and there was a statute of Maryland, passed in 1769, while Maryland was still a colony, which assumed to give rights to French subjects to hold land if they *qualified themselves as citizens of Maryland.* Later, however, the United States made a treaty with France, which Chief Justice Marshall said vested in the French heirs the title by descent. In stating the case, the opinion speaks of the statute of Maryland, and, referring to the French heirs, he says, "did his land pass "to these heirs, or did it become escheatable. This de- "pends on the law of Maryland." But that phrase was not the decision of the case. None of the parties in that case attacked the right of Maryland to make any

statute on the subject. The observation of the Court upon the effect of the statute only leads up to the decisive part of the opinion, as to the whole matter being superceded by the treaty.

In the case Spratt *vs.* Spratt, 1 Peters, 344, it is said:

> "The question of law which arose was the true "construction of a statute of the State of Mary-"land," reading—
>
> "That any foreigner may, by *deed* or *will* to be "hereafter made, take and hold lands," etc.

To take by deed or will is to take by purchase, not by inheritance.

The question before this Court is the right of the States to give non-resident aliens the right to take by *inheritance.*

Therefore, whatever was said in that case is not decisive of this question.

In the case of Levy *vs.* McCartee, 6 Peters, 103, Justice Story says, at page 109, that the question to be decided is, "whether one citizen can inherit, in the col-"lateral line, to another, when he must make his pedi-"gree of title through a deceased alien ancestor."

And the decision, being on this point alone, was that he could not.

The words used by the Court—"the question is one of "purely local law, and as such must be decided by this "Court"—have no controlling force in the opinion, because nobody denied that proposition; and the idea that a State has no right, under the Constitution, to meddle with the rights of inheritance of land by non-

resident aliens, seems not to have occurred to anybody connected with that case.

In Beard *vs.* Rowan, 9 Peters, 313, Justice Thompson says:

> "Both parties claim under the will of John "Campbell as the source of title. The demand- "ants claim under a deed from Richard Taylor, "the surviving executor of John Campbell bear- "ing date the 21st of April, 1826, etc. * * * "the tenant claims under a devise in the will of "John Campbell, and the decision in the case de- "pends mainly upon the *construction to be given to* "*this devise.*"

Is it not absurd for counsel to parade that decision concerning *purchase*, as being conclusive upon this Federal question of *inheritance?*

The decision in Mager *vs.* Grima, 8 How., 490, shows a statute of Louisiana, that every person not being domiciliated in that State, and not being a citizen of any State or Territory in the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, shall pay a tax, etc.

The plaintiff in error was the *residuary legatee* of a decedent under a will.

So that that case did not necessarily involve more than the right of a State to tax aliens who took by *purchase.*

But while the counsel in that case spread over broader ground, yet the only constitutional objection to the tax was, because as a tax on money to be sent out of the country, it would be an interference with the

power of Congress to regulate commerce. A proposition which was not sustained. But no one in that case contended that the State tax on aliens, as to inheritance of land, violated the treay making power of the general government.

In Prevost *vs.* Greneaux, 19 How., 7, objection was made to this same tax. A man died in Louisiana in 1848, and the tax became due. A treaty was made between the United States and France in 1853, and in 1854 a brother came from France, obtained the property, and objected to the tax, claiming that the treaty had relieved him. The tax was upheld because it became due before the treaty, which yet contained nothing inconsistent with the tax.

But, in that case, the Court say:

> "The constitutionality of the law is not disputed."

How, then, can that decision be an authority on our present Federal question?

The decision in Frederickson *vs.* Louisiana, 23 How., 447, however, throws all of these Louisiana tax cases out of our further consideration here, by showing that the statute in question—

> "does not make any discrimination between the citizens of the State and aliens in the same circumstances. A citizen of Louisiana domiciliated abroad is subject to this tax."

In Airhart *vs.* Massieu, 98 U. S., 491, the Court, recognizing the old just rule that the division of an empire does not divest private titles, concedes the powers of

the Republic of Texas to make its own Acts of Congress.

Hauenstein *vs.* Lynham, 100 U. S., 483, was a decision to the effect that the treaty with Switzerland controlled and superceded the statutes of Virginia.

No one engaged in that case raised the point, that the entire subject of inheritance of land by aliens was forbidden to the States, but the Judge unconsciously decided the point as we contend when he said:

> (100 U. S., p. 490, top): "Mr. Calhoun says:
> "'Within these limits, all questions which may
> "'arise between us and other powers, be the sub-
> "'ject matter what it may, fall within the treaty-
> "'making power and may be adjusted by it. (Treat
> "'on the Const. and Govt. of the U. S., 204.)'
> "If the national government has not the power
> "to do what is done by such treaties, it cannot be
> "done at all, for the States are expressly forbid-
> "den to 'enter into any treaty, alliance, or confed-
> "'eration.'"

Griffith *vs.* Cody, 113 U. S., 96, was a contest over the possessory right to a cattle range in California, on Government land. It involved only a question of fraud by a dishonest administrator, against heirs, aliens, residents of this State.

Their only inheritance was cattle, horses, and the possessory title to the range.

It did not involve the remotest suggestion of our present Federal question.

The case of Hanrick *vs.* Patrick, 119 U. S., 156, did not involve any reference to the Federal question whether a State can take any action on this subject of in-

heritance of land by non-resident aliens. In that case the laws under which the aliens claimed were laws of the Republic of Texas; laws enacted by an independent nation; and when Texas was admitted as a State those laws were, by the Act of Admission, perpetuated.

But the concession made by all parties in that case (found at page 166), that the laws of the State of Texas would have enabled the aliens to inherit if Hanrick had died later, at once yields up all possibility of our Federal question being in that case. The question here, was not there raised.

We have thus demonstrated that counsel is not supported by a single one of the authorities cited as showing that this constitutional question has been settled against our contention.

The question has not been settled.

On the contrary, this is the leading case on that subject.

No decision of this Court, or any Court of the United States has ever decided the question whether Section 10, Article I, of the Federal Constitution, does or does not prohibit the several States from regulating the right of non-resident aliens to inherit land.

The general principle of law so often quoted in the brief against us, "that to the law of the State we must "look for the rules which govern its descent, alienation "and transfer," cited from 165 U. S., 570, has no bearing here. In not a single one of the cases where that rule is repeated was this constitutional prohibition urged or considered, and the rule has no relation to it.

But, one thing we do say, *i. e.*: That never in its his-

tory has this Court awarded land to a non-resident alien by succession, under a State statute assuming to give that right.

That question is now sharply presented for decision.

The question is, can a State legally prefer a non-resident alien, to native citizens of the United States, to inherit land?

---

## AS TO $89,000 WORTH OF RENTS AWARDED TO FLORENCE ON FINAL DISTRIBUTION; AFTER WE HAD BEEN SUMMONED INTO COURT TO SHOW WHY IT SHOULD NOT BE DONE, OUR ANSWER WAS STRUCK OUT AND OURSELVES DISMISSED WITHOUT A HEARING.

Another part of the bill, to which we have not before referred (side page 68-9), alleges—

That since the filing of the original bill herein, said Florence filed in the Superior Court, in the matter of the estate of said Thomas H. Blythe, her petition for final distribution to her, wherein she prayed for an order distributing to her the residue of said estate then remaining undistributed, amounting to $89,842.94, the same being rents accrued from the real property aforesaid, to which she alleged herself to be entitled only by descent as the sole heir at law and next of kin of said decedent, Thomas H. Blythe, the consideration of which petition was without the jurisdiction of said Court as aforesaid.

That, in her said petition, it was made plainly to ap-

pear to said Court, as the facts then and there were, that said Florence, the petitioner, was born, and continued to be, a British subject and a non-resident alien until after the death of said Blythe and descent cast, and she was not, and never had been, within the United States until after the death of said Thomas H. Blythe and descent cast; and notice of said petition was given to your orators, who were notified and invited to come into Court and show why said petition should not be granted.

That, in obedience and response to said notice, your orators did, on January 16, 1896, file in said Court their answer, wherein and whereby they denied the right of said Florence to have said rents distributed to her, and claimed that they were the heirs and next of kin of said Thomas H. Blythe, deceased, and entitled to said rents.

That said Court, sitting in probate, without right or jurisdiction so to do, heard said petition for final distribution, and *wrongfully struck from the files the answer and opposition* so theretofore *filed by your orators*, and when your orators arose and attempted to object to, and show cause why said petition should not be granted, said Court *refused to permit your orators to be in anywise heard.*

And afterwards said Court granted to said Florence, and made a decree distributing to her, all the residue of said estate, solely upon said petition.

It appears to us a very clear proposition that, under the ruling of Windsor *vs.* McVeigh, 93 U. S., 274, the decree granted by the Court was void as against us, after our answer had been struck out.

We were in Court after being summoned to come in; --we answered, and attempted to support our answer.

We were refused a hearing, and our answer was struck out.

A judgment *pro confesso*, after striking out an answer because of defendant's contempt, is held, in Hovey *vs.* Elliott (N. Y.), 39 L. R. A., 449, affirmed 167 U. S., 409; 42 L. ed., 215, to be void on collateral attack, as a denial of the constitutional right to defend. With this case is an extensive note on the subject of a decision against a constitutional right as a nullity subject to collateral attack.

In the brief on motion to dismiss, on pages 44 to 47, counsel quotes the Code provisions of this State, making decrees of final distribution conclusive, and he industriously holds up to view various late decisions of our Courts firmly maintaining the conclusiveness of such decrees; and, finally, with a show of virtuous indignation, counsel goes outside the averments of the bill, and points out (what was not pleaded), that these appellants appealed to the State Supreme Court also from that decree of final distribution, and that it was dismissed, the Court saying:

> " The appellants are concluded by the decisions
> " of this Court upon their other appeals. They are
> " no longer parties." (Citing:)
>
> Re Blythe, 115 Cal., 553.

Now, counsel ought not to go outside this record in the effort to secure estoppels.

But if that decision, found in 115 Cal., 553, is to be taken notice of at all, we beg leave leave to say that,

although these appellants took an appeal from that decree of final distribution, yet they *never filed the record in the Supreme Court. No record on that appeal ever was filed* there.

The motion to dismiss was *because* the record had not been filed.

So it may appear strange that the Supreme Court of California should have made a decision of bar and estoppel, without any record before them.

But, aside from that, appellants had never had their day in Court. They had been invited in and then driven out without a hearing.

Such is the value of the decree of final distribution.

---

## SECTION 671 OF THE CIVIL CODE OF CALIFORNIA, AS TO ALIENS, IS VOID.

*A decree of a State Court on or in execution of a statute that is void is itself void.*

*Ex parte* Siebold, 100 U. S., 376.
*Ex parte* Yarborough, 110 U. S., 651.

A void judgment is not admissible in evidence.
State of Mo. *vs.* Tiedeman, 10 Fed. Rep., 20-21.

A State statute asserting an authority in excess of the State's jurisdiction is void.

Reddy *vs.* Tinkum, 60 Cal., 459.

A State statute cannot operate beyond the boundaries of the State, nor upon foreign subjects.

Even the Constitution of the United States does not extend its guaranty of the right of trial by jury outside its own territories.

*In re* Ross, 140 U. S., 453.

At the time of descent cast, Florence was in England, and a British subject. Appellants resided in Arkansas and Kentucky respectively, and were citizens of the United States, and were the next of kin of Thomas H. Blythe. The title to the real estate vested in them at once by descent, before Florence came to this country.

The principal argument made by opposing counsel is, that the State Court of California *awarded* the real property to Florence, right or wrong, and that is the end of the controversy, whether the statutes of the State, under which the award was made, were in violation of the Federal Constitution or not. It does not matter, they say, whether or not the regulation of the descent of real property to non-resident aliens is within the sovereignty of the State (page 56, appellee's brief).

Where the State statute under consideration involves a question of repugnance with the Federal Constitution, its validity will not depend upon State decisions.

Chicago Ry. *vs.* Minnesota, 134 U. S., 456-7.

If a statute is in conflict with the Federal Constitution, and has been upheld by the State Courts, it will be held that it denies due process of law.

Chic., B. & Q. Ry. *vs.* Chicago, 166 U. S., 226.

## THE JUDGMENT OF THE STATE COURT, EVEN WHERE THERE IS JURISDICTION, BINDS ONLY ON THE ISSUES RAISED IN THE PLEADINGS.

Findings upon issues not tendered by the pleadings must be disregarded.

Hall *vs.* Arnott, 80 Cal., 349.
Yosemite Valley *vs.* Bernard, 98 Cal., 199.
Phelan *vs.* Gardner, 43 Cal., 306.

It is a fundamental maxim, both in this Court and in Courts of law, that no proof can be admitted on any matter which is not noticed in the pleadings.

A decree entirely outside the issues raised in the record is *coram non judice.*

Windsor *vs.* McVeigh, 93 U. S., 282-3.

*In her first petition* to establish heirship, Florence did not set up that she was an alien, nor did it appear in the initial pleadings that her guardian was an alien. These facts appeared later in the trial. Thereupon, the Court should have dimissed the petition for want of jurisdiction as soon as they did appear. See Carr *vs.* United States, 98 U. S., 438, where the Court say that "it might not be apparent until after suit brought that "the possession attempted to be assailed was that of "the Government; but when this is made apparent by "the pleadings or the proof the jurisdiction of the "Court ought to cease."

Four things are necessary, jurisdiction being complete, to constitute *res adjudicata:*

1. Identity of the thing sued for, or subject matter of the suit.

2. Identity of the cause of action.

3. Identity of the persons and of parties to the action.

4. Identity of the quality in the persons for or against whom the claim is made.

2 Black on Judgments, Sec. 610.

Florence did not set up in her initial petition in the probate proceedings that she was an alien and illegitimate, or that her guardian was an alien.

She did not claim in the quality of an alien. Nor was the cause of action the same. The State Court has not in the litigation inaugurated by her, passed upon the legal effect of her *quality as an alien.* She cannot hide this quality in a suit, and claim that a decision in her favor in such a suit where such quality is hidden binds the heirs at law. Florence was silent on alienage in filing her first petition, claiming, presumably, as a citizen.

Such claim laid no foundation in the pleadings for a Federal question, and, therefore, looking at such pleadings, this Court found no jurisdiction in the case of Blythe *vs.* Ayres, 167 U. S., on writ of error.

Kipley *vs.* Illinois, 170 U. S., 182-7.

The jurisdiction to re-examine the final judgment of a State Court cannot arise by inference.

Louisville and Nashville R. R. *vs.* Louisville, 166 U. S., 715.

When these appellants took a writ of error from this Court to the Supreme Court of California, hoping to get

this Court to reverse the decree of distribution, whereby Florence had acquired possession of this land, Florence's counsel, whose names are signed to the moving brief herein, seemed very familiar with the rule last mentioned. These appellants in their brief there attacked the Section 671, C. C. of California, as bing void; and thought that this Court would take notice of its being so.

But the present counsel for appellee there sharply contended that, as the precise Federal question had not been raised in the trial Court, this Court had no jurisdiction.

We invite special attention to what counsel there said. It was in Case No. 804, October Term, 1896, in the brief filed by appellee to dismiss for want of jurisdiction; this language is used, on page 25:

> "VI. If it were a Federal question whether a "State could give non-resident aliens the right to "inherit land within the State, no such question "was raised in any form in the proceeding on dis- "tribution, sought to be reviewed."

This Court evidently took that view, for it dismissed the writ.

As a result, Florence's decree of distribution, her muniment of title, was safe from attack on appeal; and when we come to attack it in this suit, on the ground that it is void, the same counsel, in their too great zeal to bring *res judicata* to bear, forget the claim they formerly made, and now exclaim that all these things were litigated in the proceedings for distribution.

On page 56 of the moving brief herein, counsel say:

> " The question of the capacity of the alien to in-
> " herit *was necessarily involved by the decrees that she*
> " *did inherit.*"

And, on page 74:

> " Now, this question was necessarily involved in
> " the decrees of the Superior Court. For it cannot
> " be disputed that appellee's capacity to inherit
> " *was necessarily involved in the decrees that she did in-*
> " *herit.* Being necessarily involved, it would not
> " matter whether the facts were actually litigated
> " or not. In the subsequent suit in the Federal
> " Court to quiet title to the property, the probate
> " decrees were conclusive of everything which
> " might have been litigated."

When directly appealed from, the Federal question had not been involved at all; but when the decree of distribution is needed as a bar, they say the Federal queston was necessarily involved, so as to have that Federal question properly barred; and this, though appellants, after being summoned, were not permitted to be heard.

But by what right does counsel now argue that the Federal question involved in this case was involved and determined in those probate proceedings?

The bill in this case alleges (side page 67):

> " Your orators allege that none of the constitu-
> " tional or other objections aforesaid, to the juris-
> " diction of said Court or the validity of said sta-
> " tutes, as applicable to said Florence, were de-

"cided or considered by the Court upon the hear-
"ing of said petition for distribution."

Florence filed no pleading in the Circuit Court to this bill, except a motion to dismiss it for want of jurisdiction.

That motion admits all the allegations of the bill as true, so counsel has no right to dispute the facts there averred. They are to be taken as true.

Counsel is not entitled to deny what the bill affirms, and ask this Court to listen to a protracted argument upon it.

The bill showing diverse citizenship, and land within the jurisdiction of the Court, sets up facts to show that defendant is in possession of land belonging to themselves; that she obtained said possession through void judicial proceedings based upon a void statute, and showing that the reason why the statute is void is because it is repugnant to the Constitution of the United States; and asking that her judgments be ignored and that complainants have possession of their land..

Notwistanding the double showing of jurisdiction made out, first by the diverse parties and second by the essentially Federal character of the question involved, Florence's counsel move to dismiss for want of jurisdiction.

The Court decides that it has no jurisdiction, and dismisses the bill, and gives to complainants a certificate showing Federal questions.

Complainants appeal, and Florence's counsel move to dismiss because of the lack of jurisdiction.

In other words, this Court's jurisdiction to inquire

into the jurisdiction of the Circuit Court is denied, where the Circuit Court dismissed for want of jurisdiction.

And, in support of the claim that this Court has no jurisdiction, on appeal, to enquire into the jurisdiction of the Circuit Court, counsel not only argue the cause from end to end, but allege the principal fact in the case (of this question not having been before litigated) to be just the reverse of what the case shows it; and, to wind up, assert that the Circuit Court actually tried and decided the case against us on the merits.

On page 100 of the moving brief herein, we find these words, concerning the action of the Circuit Court:

> "The record shows that *it did, in fact, assume "jurisdiction of the cause, and did, in fact, decide it "on the ground of want of equity jurisdiction.*"

This claim is made, although there was neither plea, answer, or demurrer filed by said Florence therein.

IT IS NOT PRETENDED THAT THE STATE COURT WAS EVER CALLED UPON BY FLORENCE TO DECIDE ON THE VALIDITY OF SECTIONS 671-672 OF THE CIVIL CODE OF CALIFORNIA.

The defendants (these appellants) could not raise these questions, because the initial proceeding to establish heirship was a special, practically an *ex parte*, proceeding, in which defendants (appellants here) were unwilling defendants. The whole case was tried on the pleadings that Florence chose to put in.

The validity of these statutes was, in the State re-

cord, neither questioned nor decided, hence their validity has not been drawn in question or passed upon to this day.

Leeper *vs.* Texas, 139 U. S., 463.

Claiming a right under a statute does not put in issue the *validity* of the statute.

United States *vs.* Seymour, 153 U. S., 353.
Ferry et al. *vs.* King County, 141 U. S., 668.

---

## THE JURISDICTION OF THE HONORABLE COURT BELOW DEPENDED UPON DIVERSE CITIZENSHIP, AND THE VALUE OF THE PROPERTY INVOLVED, AND THE SITUATION OF SAID PROPERTY WITHIN THE NORTHERN DISTRICT OF CALIFORNIA, AND NOT UPON WHAT HAD BEEN DONE IN RESPECT OF THE PROPERTY BY A STATE COURT OF CALIFORNIA, PREVIOUSLY.

The claim of Florence Blythe to this estate is a fraud upon the laws of California and of the United States, and upon complainants, and is so charged in the bill. The arguments made in favor of Florence in this case, that a Federal Court cannot look into and through probate proceedings when their conclusiveness and binding force are challenged, have been made and answered many times before in the history of this Court.

In the case of Arrowsmith *vs.* Gleason, 129 U. S., 98, the contention of appellant is met and decided adversely to her; thus:

"But it is insisted that the Circuit Court of the "United States, sitting in Ohio, is without jurisdic-

"tion to make such a decree as is specifically "prayed for, namely: a decree setting aside and "vacating the orders of the Probate Court of De- "fiance County. If by this is meant only that the "Circuit Court cannot, by its orders, act directly "upon the Probate Court, or that the Circuit Court "cannot compel or require the Probate Court to "set aside or vacate its own orders, the position "of the defendants could not be disputed; but it "does not follow that the right of Harmening in "his lifetime, or his heirs since his death, to hold "these lands against the plaintiff cannot be ques- "tioned in a Court of general equitable jurisdiction "upon the ground of fraud. If the case made by "the bill is clearly established by proof, it may be "assumed that some State Court of superior juris- "diction and equity powers, having before it all "of the parties interested, might afford the plain- "tiff relief of a substantial character, but, whether "that be so or not, it is difficult to perceive why "the Circuit Court is not bound to give relief ac- "cording to the recognized rules of equity as ad- "ministered in the Courts of the United States, "the plaintiff being a citizen of Nevada, the de- "fendant a citizen of Ohio, and the value of the "matter in dispute, exclusive of interest and cost, "being in excess of the amount required for the "original jurisdiction of such Courts."

In Payne *vs.* Hook, 7 Wall., 425, this Court observes, that the constitutional right of a citizen of one State to sue a citizen of another State in the Courts of the United States would be worth nothing if the Court in

which the suit is instituted could not proceed to judgment.

On page 99 of Arrowsmith case it is said, the later decisions of this Court show that the proper Circuit Court of the United States may, without controlling, supervising, or annulling the proceedings of State Courts, give such relief as is consistent with the principles of equity.

On page 100, it is said, the fact of being a party does not estop a person from obtaining, in a Court of equity, relief against fraud; it is generally parties who are the victims of fraud.

The complainants in this case have never submitted their claim to the estate of Thomas H. Blythe, but have appeared only to contest the right of Florence, as she set it up in her pleadings. At no time has the question been presented to any Court, whether Section 671 of the Civil Code is constitutional. The statute of the State under which she instituted proceedings, and under which she appeared without disclosing her character, could not oust the equity jurisdiction of the Federal Courts.

Hayes *vs.* Pratt, 147 U. S., 570.

---

## THE TREATY-MAKING POWER.

This controversy is really narrowed down by appellee to a single proposition. The bill charges in appropriate language to give this Court jurisdiction (of the

question whether Section 671 of the Civil Code of California is valid *quo ad* inheritance of land by non-resident aliens), that said statute is void. It is charged in the bill that California has no jurisdiction to enact, nor the Courts of California jurisdiction to enforce said statute. This is a fact well pleaded.

> Baltimore & Potomac R. R. Co. *vs.* Hopkins, 130 U. S., 210. See, also, p. 224.

This fact being admitted, judgment should go for appellants on the face of the record. Appellee upholds this statute solely and only on the ground that no treaty exists in conflict with it. They say, in their brief filed in the Honorable Court below:

> " The State law concerning aliens is valid until " the Senate does exercise the treaty-making " power."

---

## COUNSEL SAY THAT SECTION 671 IS NOT A TREATY.

This is so only because the Constitution forbids it to be a treaty. Its language deals with the subject of treaties. Suppose that it be amended so as to declare that all French subjects may inherit land in California, provided France extends the same privileges to residents of California. Such a statute could as well be enacted as the present one. Treaties are the declarations of reciprocal rights by different nations, within the region of international intercourse. Sec. 671 is within the treaty field. As to aliens, it spends its force entirely in that field.

## REQUEST TO DECIDE THE CASE.

Counsel for appellee, in the concluding paragraph of their brief, on page 100 thereof, respectfully ask for an expression of this Honorable Court's opinion upon the question of the non-resident alienage of appellee at the time of descent cast. We respectfully join in that request, as we do not wish to prolong this litigation an unnecessary hour. In making such decision, the Court will see that the issue is a single and narrow one: Has California jurisdiction over non-resident aliens, either to adopt them or vest them with the right to take land in California in fee simple, and remain thereon forever at home, in defiance of the power of the Federal Government to exclude them from the country? Opposing counsel, in their brief in the Circuit Court in this case, which we feel at liberty to quote, say:

> "As we read the bill, it is not pretended that "the treaty-making power has been so exercised as "to affect the legislation of California in regard to "aliens, and it must be held that, as in the case of "a State insolvent law, the law is valid and proper "until Congress exercises the power of regulating "bankruptcies, and even thereafter, except only in "so far as the insolvent conflicts with the bank-"rupt law. So, the State law concerning aliens is "valid, till the Senate does exercise the treaty-"making power."

We construe this language to admit, as well as the language of the present brief, page 63, that the regulation of the descent of real property to non-resident aliens is within the treaty-making power of the Fed-

eral Government, but that the State may exercise the power to so regulate, until a treaty on that subject be actually made. That is to say, that the power is dormant, if no treaty be made, and the State may exercise it while it is so dormant.

If the power be not dormant, or concurrent in the State and Federal Governments when no treaty exists regulating said descent, appellee has no title to the property in question.

Such power cannot be dormant.

> Homes *vs.* Jennison, 14 Peters, 576.
> Wabash, etc., Ry. Co. *vs.* Illinois, 118 U. S., 558-575.

Even if it were a dormant power, it is a (dormant) Federal power, and not a dormant State power; and like the power to make war, can never be exercised by the State.

---

## CONCLUSION.

In conclusion, we will remark, that opposing counsel charge that much, if not all, of the arguments employed by complainants to make good their claims are wild imaginings, and further, they say, in conclusion, that if there were a treaty, it would be in their favor. This prophecy can hardly escape the stigma of wild imagination. It is also charged that complainants are abusing the processes of the law in pressing their claim. It will be observed by this Honorable Court

that the facts are, that complainants are the nearest blood relatives of the deceased Blythe; that they are citizens of the United States, legally entitled to inherit the real estate in controversy under the laws of California and Section 1978 of the Revised Statutes of the United States; that they have never been the *actors* in presenting their claim to the said property in the State Court, but have appeared there as defendants merely, in special proceedings that could not be removed to the Federal Court, at all times denying appellee's title.

Complainants have never had their day in Court on the issues and principles of law upon which they rely to make good their claim. This Honorable Court held in Lawrence *vs.* Nelson, 143 U. S., 223, that there was a difference in the binding force of voluntary and involuntary proceedings. The special proceedings of an administrative nature were inaugurated in the Probate Court of California, by appellee giving notice thereof by publication. It is true that apellants appeared therein, but only to deny appellee's title. The true relation, if any at all, of appellee to Blythe was kept out of sight, and not by appellee set up or stated in her initial pleading, judgment upon which was and is the only foundation for all subsequent action of the State Court. Complainants now come into the Federal Court, as they have a constitutional right to do, and for the first time after the perfunctory administration is closed, set forth their title, and the circumstances under which appellee worked her way through practically *ex parte* proceedings under the State law. Surely, appellee presents no persuasive

equity in her favor. She comes here as the unauthenticated offspring of a foreign land. Opposing counsel, in the poetry of their zeal to get this property, say, that if there was any treaty, it would be in our (their) fa-
" vor, for no nation—and certainly not Great Britain—
" would be guilty of the barbaric folly of stipulating for
" the imposition of disabilities upon her own subjects" (p. 64 of opposing brief).

This observation is full of interest. It concedes, first, that appellee is a British subject under disability. It implies great admiration for Great Britain. The writer, for the moment, forgot that it is admitted that no law exists in England whereby illegitimates may or can be adopted in England. It seems that Great Britain has not extended legal indulgence to promiscuous intercourse, and has not obliterated the distinctions in legal favor between persons born within and without lawful wedlock. Counsel forgets that the disability took place in England, for which England furnishes no relief at home. What justification, then, is there for the hypothesis that, if there were a treaty, England would insist that a foreign country would be more tender of the frailties of her own subjects than she is of such subjects at home. Human history furnishes no instance where one nation has allowed its politeness to another nation to be so taxed that it postponed the rights of its own respectable and decently born citizens to the ill-begotten of said other nation.

If this Honorable Court measure the legal rights of appellee to real property in this country with her rights to take similar property in her own home, her claim will disappear.

There is no strength in the censure visited upon appellants for respectfully claiming as next of kin in the Courts of their country, what belongs to them, though, in so doing, they offend one having no claim thereto in law or in ethics.

This Court has complete jurisdiction of this appeal, and so, the motion to dismiss should be denied.

A motion to affirm is never granted unless it is manifest that the appeal is for delay only, or that the question on which jurisdiction depends is so frivolous as not to need further argument.

Neither of those conditions exists on this appeal.

The question which we raise is one of great national importance, and upon its solution much may depend in the future history of this Union.

It has never been considered by this Court before.

Wherefore, the motion to affirm should be denied.

Respectfully submitted,

S. W. HOLLADAY,
E. B. HOLLADAY,
Solicitors for Appellants.

JEFFERSON CHANDLER,
Of Counsel.

S. W. Holladay

E. B. Holladay

Solicitors for appellants

Jefferson Chandler
of Counsel